No. 07-439

IN THE

Supreme Court of the United States

JAMES A. MCDERMOTT,

Petitioner,

v.

JOHN A. BOEHNER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

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November 13, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REASONS FOR GRANTING THE WRIT

I. The Decision Below Warrants This Court's Review.

Rep. Boehner first argues that this Court's review is unwarranted, wholly apart from the merits of the decision below, on the ground that (1) "the issues in this case are n[ot] important," and (2) there is no "confusion in the lower courts as to the governing principles." Opp. 9 (capitalization modified). He is wrong on both scores.

As to importance, this Court already has recognized that the First Amendment issue presented here is "important," *Bartnicki v. Vopper*, 532 U.S. 514, 517 (2001), and the D.C. Circuit only confirmed that point by taking the case *en banc* (and hearing *en banc* oral argument not once but twice). And, as highlighted in the *amicus* brief submitted by several leading Members of Congress, the *en banc* D.C. Circuit's resolution of that First Amendment issue gives rise to an equally important separation of powers issue. Certainly, Rep. Boehner's determination to litigate this case for almost a decade belies his current suggestion that the constitutional issues involved here are not "important."

As to confusion in the lower courts, the dueling 5-4 majorities on the *en banc* D.C. Circuit obviously refute Rep. Boehner's suggestion that the law in this area is clear. Five judges of that court concluded that Rep. McDermott "lawfully obtained" the tape from the Martins within the meaning of *Bartnicki*, *see* Pet. App. 17-24a, whereas four other judges concluded that he did not, *see* Pet. App. 7a n.1. But a different five-judge majority concluded that Rep. McDermott still could be punished under the federal wiretapping statute, notwithstanding *Bartnicki*, on the ground that he violated an internal House rule, *see* Pet. App. 7-13a, whereas four other judges concluded that this point was legally irrelevant as well as incorrect, *see* Pet. App. 24-30a. Given that the *en banc* D.C. Circuit produced two different 5-4 majorities in this

case, Rep. Boehner's assertion that "the governing principles" here are settled, Opp. 9, rings hollow.

Accordingly, Rep. Boehner misses the point by insisting that certiorari is unwarranted because there is no "circuit split" on the issues presented in the petition. Opp. 9. Circuit splits are not meaningful in and of themselves; they are meaningful to the extent they highlight lower-court confusion warranting this Court's guidance. But a divided *en banc* decision often highlights such confusion too, and to that extent warrants review even absent a circuit split. *See, e.g., Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2749 (2007); *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939 (2007); *Zuni Public Sch. Dist. No. 89 v. Department of Educ.*, 127 S. Ct. 1534, 1540 (2007); *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 427 (2006). If the *en banc* D.C. Circuit cannot agree on what *Bartnicki* means, the time has come for this Court to clarify that decision. Indeed, as one prominent commentator recently noted, "[t]he decision in *Bartnicki v. Vopper* raised at least as many questions as it answered, including what is meant by material 'lawfully obtained,' and what types of persons fall inside or outside the contours of the holding." Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 25:45.60 (2007).[1]

In any event, this Court in the past has not waited for a circuit conflict (or even a divided *en banc* decision) to address important constitutional questions involving the

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[1] Rep. Boehner himself underscores this point, at the very end of his brief, *see* Opp. 32-35, by trying to distinguish *Bartnicki* on a variety of grounds rejected by the majority of the *en banc* court below, *see* Pet. App. 14a (Griffith, J., concurring); *id.* at 17-24a (Sentelle, J., dissenting), and subsequently by the First Circuit, *see Jean v. Massachusetts State Police*, 492 F.3d 24, 32 (1st Cir. 2007).

First Amendment or the separation of powers. *See, e.g.*, *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 54 (2006); *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 376-77 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 9 (2004); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 159 (2002); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 566 (1995); *Nixon v. United States*, 506 U.S. 224, 228 (1993); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991); *Ward v. Rock Against Racism*, 491 U.S. 781, 789-90 (1989). Indeed, *United States v. Aguilar*, 515 U.S. 593 (1995)—the case upon which Rep. Boehner bases his entire First Amendment argument—involved no such circuit conflict. The Supreme Court of the United States, not a fractured *en banc* D.C. Circuit, should have the last word on these important constitutional issues.

Rep. Boehner insists, however, that cases involving First Amendment protection for those who violate a special duty of nondisclosure are rare and unlikely to recur. *See* Opp. 9-12. He bases that argument on the assertion that "the number of people in sensitive confidential positions is quite small." Opp. 10. But that assertion, for which he provides no support, is simply not true. Rep. Boehner himself insists that *all* "public officials" fall into that category, on the ground that they "accept[ed] a position of trust." *Id.* at 21. Moreover, many people in the private sector labor under duties of nondisclosure; indeed, it is hard to imagine any employee who does *not* labor under such a duty, at least with respect to information relating to his employer's business. Under the decision below, anyone who violates such a duty, whether knowingly or unknowingly (including whistleblowers), may be punished not only for that violation, but also under *any* other criminal or civil law

without any First Amendment defense whatsoever.[2] Rep. Boehner may believe that this state of affairs is fine and good, but he cannot deny that the decision below has broad ramifications.

Finally, Rep. Boehner argues that this Court's review is unwarranted because the divided *en banc* decision below "did not purport to set forth any generally applicable principle of law." Opp. 9. That is truly a remarkable assertion, given that the very premise of the rule of law is that courts apply generally applicable principles of law to all who come before them, and do not devise special rules for particular litigants. Especially where, as here, the litigants are political figures, courts must be especially scrupulous to abide by generally applicable principles of law to avoid even the appearance of partiality. If anything, thus, Rep. Boehner's characterization of the decision below as "a restricted railroad ticket, good for this day and train only," Opp. 11 (internal quotation omitted), only raises a red flag.

Moreover, it is simply not true that the *en banc* decision below "did not purport to set forth any generally applicable principle of law." Opp. 9. To the contrary, that decision rests on the radical and far-reaching principle that if particular speech may be punished under *some* law without violating the First Amendment, then that speech

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[2] Indeed, under this view, there is no reason (other than *Bartnicki*) why the nondisclosure duty in the federal wiretapping statute itself should not suffice to trump the First Amendment—as Judge Randolph insisted before *Bartnicki*. *See Boehner v. McDermott*, 191 F.3d 463, 477 (D.C. Cir. 1999) (opinion of Randolph, J.) ("McDermott ... obtained the tape under a duty of nondisclosure. In his case the duty arose from a statute—§ 2511(1)(c)."); *see also id.* at 478 ("[McDermott] had a duty ... of nondisclosure. The duty stemmed of course from every citizen's responsibility to obey the law, of which § 2511(1)(c) is a part.") (opinion of Randolph, J.).

may be punished under *any* law without violating the First Amendment. *See* Pet. App. 11a ("If the First Amendment does not protect Representative McDermott from House disciplinary proceedings, it is hard to see why it should protect him from liability in this civil suit."); *id.* ("Either he had a First Amendment right to disclose the tape to the media or he did not."). Indeed, that principle is the very linchpin of the *en banc* majority's analysis, as it is the sole ground on which the majority purported to distinguish *Bartnicki*. Not surprisingly, Rep. Boehner devotes the bulk of his brief to defending that principle on the merits, *see* Opp. 15-24, which obviously refutes his assertion that this case does not involve "any generally applicable principle of law," Opp. 9.

In addition, the separation of powers issue created by the *en banc* majority's resolution of the case is important in its own right. The majority seized on language in an Ethics Committee Report that *terminated* a charge against Rep. McDermott without even referring the matter to an Adjudicatory Subcommittee as a supposedly conclusive adjudication that he violated a nondisclosure duty. *See* Pet. App. 12-13a. The circumstances under which the Judicial Branch may rely on internal reports of the Legislative Branch to punish a member of the Legislative Branch obviously represents an important issue that implicates relations between the Branches. As the *amici* Members of Congress explain, "Congress must be able to conduct its legislative affairs, and to discipline its members, without fear that those members who are dissatisfied with the outcomes of the political process will seek to undermine it, and indeed to achieve a more permanent victory than the political process allows, in the nation's courts." Br. of Reps. Berman, Frank, Lofgren & Miller as *Amici* in Support of Petr. ("*Amici* Br.") 14.

II. The Decision Below Is Wrong.

Rep. Boehner next argues that the *en banc* decision below is correct, both in its limitation of *Bartnicki* and in

its conclusion that the House Ethics Committee unequivocally adjudicated a violation of an internal House nondisclosure rule. *See* Opp. 15-35. Rep. Boehner is wrong on both scores.

A. The First Amendment Issue

Rep. Boehner asserts that this Court's decision in *Aguilar* is the beginning and the end of the First Amendment analysis in this case, and "mandate[s]" the result below. Opp. 16. In particular, he insists that *Aguilar* justifies the D.C. Circuit majority's conclusion that if particular speech may be punished under *some* law without violating the First Amendment, then that speech may be punished under *any* law without violating the First Amendment. *See* Opp. 15-24.

If anything, that argument only underscores why certiorari is warranted here. If indeed Rep. Boehner's broad reading of *Aguilar* is correct—and, to be fair, it was embraced by a majority of the *en banc* D.C. Circuit—then it highlights a doctrinal anomaly in this Court's First Amendment jurisprudence. As noted in the petition, such a broad reading of *Aguilar* conflicts with an otherwise solid wall of precedent holding that whether a particular limitation on speech violates the First Amendment depends on the nature of the particular limitation, not on the nature of the speech. Indeed, that is the very lesson of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In that case, this Court held that even speech that could be proscribed outright without violating the First Amendment (there, "fighting words") could not be proscribed in a content- and viewpoint-discriminatory manner. *See id.* at 391-93. The greater power to proscribe certain speech, in other words, does not include the lesser power to proscribe that speech in any manner whatsoever, and does not render such speech invisible to the First Amendment. Or, as this Court more recently put it, "[t]he fact that a law is capable of valid applications does not necessarily mean that it is valid as

applied to these litigants." *FEC v. Wisconsin Right To Life, Inc.*, 127 S. Ct. 2652, 2670 n.8 (2007) (internal quotation omitted); *see also* Pet. 17-19 (citing other cases).

The broad interpretation of *Aguilar* embraced by Rep. Boehner and the *en banc* majority below cannot be squared with this line of authority. Indeed, neither Rep. Boehner nor the *en banc* majority below even *attempts* to do so. Rather, they simply insist that *Aguilar* says what it says and no further inquiry is necessary or appropriate. In particular, the opposition brief makes no attempt to address or distinguish any of these other cases, but simply insists that *Aguilar* stands for the proposition that if Rep. McDermott constitutionally may be punished for violating a House nondisclosure duty, then he has "no First Amendment right to disclose," Opp. 21, and constitutionally may be punished for violating *any* nondisclosure duty, including a duty that is otherwise unconstitutional. For present purposes, the key issue is not whether Rep. Boehner is right or wrong on this score, but that if he is right, then *Aguilar* is a truly radical decision that creates internal incoherence in this Court's First Amendment jurisprudence that warrants clarification. *See, e.g., Freedom from Religion Found., Inc. v. Chao*, 447 F.3d 988, 988 (7th Cir. 2006) (Flaum, C.J., concurring in denial of rehearing en banc) ("[T]he obvious tension which has evolved in this area of jurisprudence ... can only be resolved by the Supreme Court."), *rev'd*, 127 S. Ct. 2553 (2007).

In any event, as Judge Sentelle (joined by Judges Rogers, Tatel, and Garland) noted in dissent below, it is neither necessary nor appropriate to read *Aguilar* in such a broad and destabilizing manner. *See* Pet. App. 27-28a. *Aguilar* simply reaffirmed the proposition that "[a]s to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public." 515 U.S. at 606 (citing *Snepp v. United States*,

444 U.S. 507 (1980) (*per curiam*)). Here, of course, Rep. Boehner is not seeking to punish Rep. McDermott for violating a "voluntarily assumed ... duty of confidentiality," *id.*, but instead for violating the nondisclosure duty in the federal wiretapping statute—the very duty that *Bartnicki* held to violate the First Amendment as applied to persons (like Rep. McDermott) not involved in illegal wiretapping.

Properly understood, thus, *Aguilar* does not conflict with *R.A.V.* or any of the other cases cited above. It is only when *Aguilar* is read to override First Amendment decisions like *Bartnicki* that doctrinal incoherence results. Thus, by insisting that *Aguilar*, not *Bartnicki*, governs the First Amendment analysis here, Rep. Boehner only confirms that the *en banc* D.C. Circuit's 5-4 split on this issue warrants this Court's review.

B. The Separation Of Powers Issue

Rep. Boehner responds to the separation of powers issue by asserting, as an initial matter, that this issue does not warrant review because it "was not presented below." Opp. 24; *see also id.* at 12-13. That assertion misses the mark. Here, the separation of powers issue *results* from the way the *en banc* D.C. Circuit resolved the case by reference to the House Ethics Committee Report. *See* Pet. App. 12-13a. Needless to say, Rep. McDermott could not have challenged the *en banc* D.C. Circuit's interpretation of that Report before the *en banc* D.C. Circuit interpreted the Report in the first place.[3] Because

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[3] Indeed, the Report was not even released until after the first *en banc* argument below. At that point, Rep. McDermott filed a supplemental brief noting that the Report only "confirm[ed]" his position that the Ethics Committee rules did not unambiguously cover the disclosure at issue, and hence had no conceivable bearing here. Supp. Br. for Appellant (12/22/06), at 10; *see also id.* (noting that the Report "expressly *refrained* from concluding that Rep. McDermott had violated any duty of

(as Rep. Boehner concedes, *see* Opp. 25, 28-32) the *en banc* majority based its decision on its interpretation of the Report, that interpretation is squarely presented for this Court's review. As a matter of law, an issue is properly presented here if it was decided by the court below. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citing cases).

Contrary to Rep. Boehner's suggestion, nothing in the petition suggests that the D.C. Circuit was "constitutionally compelled to ignore" the Ethics Report. Opp. 13. Rather, the constitutional problem here stems from the *en banc* majority's reliance on the Report to "punish[] a Member of Congress," Pet. i, or otherwise "attach adverse collateral legal consequences" to his conduct, *id.* at 24. As explained in the petition, and as highlighted below by Rep. McDermott and the *en banc* dissent, *see* Pet. App. 29-30a, the Report only confirms that the *en banc* majority had no basis for concluding that Rep. McDermott violated an internal House rule.

The *en banc* majority concluded otherwise only by asserting, as does Rep. Boehner, that the Report "eliminate[s]" any ambiguity whatsoever about whether Rep. McDermott violated a nondisclosure duty to the House Ethics Committee. Pet. App. 13a; *see also* Opp. 25 ("Any concern about interpreting ambiguous rules is irrelevant because the Court of Appeals did nothing more than adopt the conclusions of the Ethics Report."); *id.* at 27-28 ("[A]ny conceivable separation-of-powers concern disappears altogether where, as here, the court defers to a specific determination by Congress of the internal rules'

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confidentiality") (emphasis in original); *id.* at 11 ("The Committee's careful phrasing, at the very least, leaves calculated ambiguity on this issue, and this Court is not in the business of construing the scope of ambiguous duties imposed under Congress' internal rules.").

applicability."). That assertion, however, only shows that both the *en banc* majority and Rep. Boehner interpret separation-of-powers "ambiguity" so narrowly as to be nonexistent. If this Report is not even "ambiguous" on whether Rep. McDermott violated a House nondisclosure duty, it is hard to know what would be.

In particular, as the *amici* Members of Congress underscore, the Report "reflected a nuanced political compromise among competing interests." *Amici* Br. 8. By using "deliberately crafted language" to resolve the matter, the Report "stake[d] out a flexible, and politically viable, middle ground in the controversy" acceptable to a Committee evenly divided between the major political parties. *Id.* at 9. By interpreting the Report to determine —supposedly *unambiguously*, no less—that Rep. McDermott violated a nondisclosure duty to the Ethics Committee, the *en banc* D.C. Circuit unconstitutionally usurped the "final word on the applicability and implications" of that Committee's rules. *Id.* "Such substitution of a court's unequivocal judgment for a carefully crafted political compromise flies in the face of separation of powers principles," and threatens not only to turn the judicial process into a political one, but to turn the political process into a judicial one. *Id.* at 13.

The bottom line here is that the federal courts are not, and should not become, a forum for those dissatisfied with a legislative resolution of an internal disciplinary matter "to achieve a more permanent victory than the political process allows." *Id.* at 14. The *en banc* D.C. Circuit's unprecedented conclusion that a Member of Congress violated an Ethics Committee nondisclosure duty, where the Ethics Committee itself pointedly refused to so conclude, represents a flagrant disregard for the separation of powers that warrants this Court's review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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